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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1340

DIXIE PLYWOOD COMPANY,
Petitioner,

versus

S. S. FEDERAL LAKES, etc., PATRAS NAVEGACION, S. A., FEDERAL COMMERCE & NAVAGATION CO., LTD., AND SOUTH ATLANTIC TERMINALS, INC.,
Respondents,

PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

LIST OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

NO.

DIXIE PLYWOOD COMPANY,
Petitioner,

versus

S.S. FEDERAL LAKES, etc., PATRAS NAVEGACION, S. A., FEDERAL COMMERCE & NAVAGATION CO., LTD., AND SOUTH ATLANTIC TERMINALS, INC.,
Respondents,

PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DIXIE PLYWOOD COMPANY respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 9, 1975 and the denial of the Petition for rehearing entered on January 7, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia is reported as Dixie Plywood Company vs. S. S. Federal Lakes, etc., Patras Navegacion, S.A., Federal Commerce & Navagation Co., Ltd., and South Atlantic Terminals, Inc., which is unreported.

The opinion of the Court of Appeals for the Fifth Circuit is set out in 525 F.2d 691. Both opinions are set forth in the appendix hereto as is the order denying the petition for rehearing which is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 9, 1975 and the order denying the petition for rehearing was entered on January 7, 1976, and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

In this Action the applicable law of damages in Admiralty was disregarded thereby creating a conflict in rulings between Circuit Courts. The Appellate Court reversed its own prior rulings and held that invoice costs rather than market value at the port of destination was determinative as the basis of damages. In doing this, the Court has also abrogated opinions of this Honorable Court. This was done in spite of the fact that there was direct evidence as to market value at the port of destination at the time of delivery of the cargo pursuant to the provisions of law. The questions presented are:

1. Whether the Court erred in awarding damages based on the invoice value where the precepts of the Carriage of Goods by Sea Act require damages to be awarded based on the fair market value at the port of destination and where there was express testimony as to the said fair market value. This error has the effect of creating a dichotomy of opinions with the Appellate Court ruling in the case of *Holden v. S. S. Kendall Fish*, 395 F.2d 910 (5th Cir.) and with other Circuits where damages were awarded based on market value at the port of destination. It also is contary to the precedent established by this Honorable Court.

STATUTORY PROVISIONS INVOLVED

49 Stat. (April 16, 1936) Carriage of Goods by Sea Act 46 USCA § 1303(8), § 3(8), "Any clause, covenant or agreement in a Contract of Carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this Chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause shall be deemed to be a clause relieving the carrier from liability."

STATEMENT OF THE CASE

This action was brought under the Carriage of Goods by Sea Act for recovery of damages to a shipment of prefinished plywood paneling aboard the defendant vessel from Korea to Savannah, Georgia, in 1973. A clean bill of lading was issued. It is admitted by defendants that damage to the shipment existed on discharge at Savannah. (App. 61) Evidence was presented expressly as to the retail value of the plywood in Savannah, the port of delivery, at the time of delivery. (App. 62) In addition, direct evidence was also presented as to the wholesale value at the same time and place. (App. 62) The District Court charged the Plaintiff with ignoring invoice price. (App. 69) Further, the District Court misapplied the COGSA Provision in question since it cited as the provision for applying damages 46 U.S.C. § 1304(5) which Provision deals with package limitations rather than damages. Package

limitations do not apply in this instant case. Therefore, in spite of the direct evidence as to market value at the port of destination at the time of delivery and contrary to the decisions in *St. John's N. F. Shipping Corp. v. S. A. Compania Geral.* 263 U. S. 119, 125; *The Ansaldo San Giorgia I v. Rheinstrom Bros. Co.*, 294 U. S. 494 and contrary to the decision of the same Appellate Court directly opposite to this ruling; namely, *Holden v. S. S. Kendall Fish*, 395 F. 2d 910 (5th Cir.) and contrary to the decision in other Circuits (see *Pioneer Import Corp. vs. The Lafcomo*, 159 F.2d 654 (2d Cir. 1947) cert. den. 331 U. S. 821) the District Court ruled, which ruling was afirmed by the U. S. Court of Appeals for the Fifth Circuit, that invoice value rather than market value at the port of destination should govern the determination of Plaintiff's damages.

REASONS FOR GRANTING THE WRIT

The failure of this Honorable Court to grant Certiorari and reverse the lower courts will result in the establishment of a new concept in proving damages in Admiralty cases within the Fifth Circuit and create a conflict with *all* other U. S. Appellate Courts. Proof of damages in Admiralty cases is obviously a most critical aspect of a trial. The rulings, if upheld, would create confusion since there can be a substantial divergence of value thereby raising a question as t to priorities. It could deprive shippers of their recompense. For instance, in the cited case of *Holden vs. S. S. Kendall Fish* (395 F.2d 910 (5th Cir.) the shipper's invoice price was $20,027.73 while the market value was $7,656.84. Obviously, the awarding of market value rather than invoice cost, as sought by the shippers in the cited case, created an economic loss for the shipper. Yet the Court was constrained to do this to uphold the precepts of COGSA. Conversely, it

failed to so rule in the instant case.

We suggest the Court should not have disregarded the clear and binding precepts of authority, both current and historical, that apply to *all* cases where market value at the point of destination has been established by direct evidence and awarded damages based on the invoice cost. In its erroneous application, the Court failed to give correct authority to its cited case of *Holden v. S.S. Kendall Fish*, 395 F.2d 910 (5th Cir.). (App. 67)

The District Court's misapplication of the law is evidenced by the statement in its Order, "Dixie of Houston would ignore invoice price". (App. 69). For the law of Admiralty requires invoice price to be ignored when there is evidence of market value at the point of destination. The inexcusable failure to adhere to the law and its upholding by the Appellate Court caused the inconsistency now prevailing in the U. S. Court of Appeals for the Fifth Circuit as distinguished from the other U. S. Appellate Courts including this Honorable Court.

In making this ruling, which had the effect of controverting the Appellate Court, the District Court also erred in its interpretation in the case of *Illinois Central Railroad Company v. Crail*, 281 U. S. 57, 64 (App. 67). In its citation the Court stated that market value may be discarded for more accurate means if available. It did not give complete weight to the full sentence of the authority on which that portion of the Order was based. It omitted that portion of the sentence which provides that other means may be applied which is resorted to if for *special* reasons market value is not exact or otherwise not applicable. (Emphasis ours) *Illinois Central Railroad Company v. Crail*, 281 U. S. 57, 64.

In the instant case, market value is proven as exact as is shown by the testimony of the Plaintiff's witness, Kirby Beam, Vice President and General Manager of a local dealer in the product. He testified as to the retail value of the plywood in the Savannah area as being $4.98 per sheet with the wholesale value being paid by his company being $3.79 per sheet. (App. 622). It should be noted that there are 150 sheets per crate with a total of 94 crates of which there are 32 crates that Defendants contend were in good order at destination. (App. 62 and 69).

The District Court Order does not set out any proof provided to show that market value will not establish a just measure of damages. The shipowner and the stevedore merely set out their computation as to damages which were essentially based on the invoice cost plus expenses without any proof that market value is not a proper measure of damages. (App. 64-65). Where the carrier contends that the market value will not establish a just measure of damages the burden of proof is on the carrier to sustain this contention. *Reider v. Thompson*, 197 F.2d 158, 160 (5th Cir.). (App. 64-65). Therefore, without such proof, the Court erred in awarding damages based on any basis other than market value at the port of destination.

We call the Court's attention to the history that caused the market value concept to be applied as set out in the Lower Court Ruling of *Holden v. S. S. Kendall Fish.* (262 F. Supp. 862 at 864). There with citations the Court stated that liability cannot be diminished by contract or otherwise under which the carrier would be liable for damages less than those computed on the fair market value of the goods at the destination.

We submit that the evidence was so clear as set out in

the Findings of Fact that the District Court erred in disregarding the market value testimony and awarding damages at less than the full value at Savannah, Georgia, and the Appellate Court erred in upholding the erroneous award.

We submit that if the decision of the Lower Courts are allowed to remain, the effect on proof of damages in Admiralty cases would be grossly undermined. The Fifth Circuit with so many port cities within its jurisdiction have many Admiralty cases. The correct application of the proof of damages has to be maintained. If these decisions are not reversed, they will establish the Fifth Circuit as an island unto itself, different from all other U. S. Courts and all rules of Admiralty. Thus all parties would be denied the guidance which must be furnished to litigants. To determine priority in respect to proof of damages shippers may, as in the instant case, defend solely to reduce damages and there will be no authoritative guidance as to which mode of proof would apply.

CONCLUSION

The decision of both lower courts being contrary to prior decisions of this Honorable Court, contrary to rulings in other circuits, and contrary to the historical precedents in regard to the proof of damages in COGSA claims, we submit that for all of the foregoing reasons Certiorari should be granted and the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be subject for review by this Honorable Court.

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CERTIFICATE OF SERVICE

I hereby certify that on the day of , 1976, I mailed a copy of Petitioner's Writ Certiorari to Respondents' attorneys of record by placing said copies in a postpaid envelope addressed to:

Mr. Ralph O. Bowden, III
Savannah Bank Building
Bull and Bryan Streets
Savannah, Georgia, 31401

Mr. Edwin D. Robb, Jr.
P. O. Box 8608
Savannah, Georgia, 31402

and depositing said envelopes and their contents in the United States mail at Savannah, Georgia.

FRED S. CLARK
Attorney for Petitioner

APPENDIX

ORDER AND OPINION - CONCLUSIONS OF LAW AND FINDINGS OF FACT

(Number and title omitted) (Filed: March 28, 1975)

I

This action is brought under the Carriage of Goods by Sea Act by Dixie Plywood Company of Houston, Inc. Plaintiff seeks recovery of damages to a shipment of prefinished plywood panelling aboard the M/S "Federal Lakes" enroute from Korea to Savannah in 1973.

Apparently the damage resulted from the shifting of the cargo due to heavy weather. However, cargo damage is also blamed on the stevedore (South Atlantic Terminals, Inc.) because of alleged rough handling in the course of discharge at Savannah.[1]

The bill of lading covering the 94 crates of plywood was a clean one without exceptions as to good order of the shipment on receipt aboard the "Federal Lakes". The shipper was Sung Chang Enterprise Co., Ltd.; the consignee was Texas Commerce Bank, and the order-notify party at Savannah was Dixie Plywood Company of Houston, Inc.

It is admitted by defendants that damage to the shipment (or part thereof) existed on discharge at Savannah. The case was tried on February 24, 1975. The principal questions before the Court are the extent of damage to the plywood and the proper measure of such damages.

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1. The vessel and the stevedore have stipulated as to their respective percentages of responsibility for damages to the cargo.

II

Dixie Plywood of Houston contends that all of the crates of plywood were damaged to the extent that the cargo was worthless for its own purposes or those of Dixie of Savannah. Plaintiff alleges that the damage to the shipment amounted to $40,305.[2]

The damages as originally computed by plaintiff appear to be based on a value of $97.17 per thousand square feet (32 square feet per sheet) or $3.11 per sheet (150 sheets per crate). The General Manager of Dixie Plywood of Houston testified that the estimate was based on actual cost plus a 15% mark-up by its vendee, Dixie Plywood of Savannah, Inc. plus the latter's ordinary 25% mark-up at retail. Dep. of J.E. Stevens, p. 5. From the value of the shipment as so computed, the amount of $21,551.11 representing proceeds of the salvage was deducted.

Another witness for the plaintiffs, Kirby Beame, Vice-President and General Manager of Guerry Lumber Company, testified that in the Savannah area the retail value of the plywood was $4.98 per sheet or $105.63 per thousand square feet. The wholesale price that Guerry Lumber Company was paying amounted to $3.79 per sheet.

The defendants contend that 32 of the 94 crates comprising the cargo were not damaged and were in sound condition and should not have been sold as salvage. The undamaged crates represented the equivalent of two truckloads of plywood and same could have been sold by the Savannah wholesaler. Defendants argue that actual damage rather than

2. It is noted that the claim of plaintiff made prior to litigation was in the amount of $30,270.40 and was based on a "landed cost" of $26,390 plus the duty of $3,880.40. See defendants' Exhibit # 3.

as computed by plaintiff, is the proper measure of damage in the case.

III

Dixie Plywood of Houston sells building materials to retail lumber yards in the Texas area. It has an international division which purchases plywood from foreign manufacturers and imports same for resale to eight wholesale warehouse companies on the east coast with which it has affiliation. Each of these Dixie Plywood concerns is a separate corporation and has separate stock ownership. Dixie Plywood of Savannah engages in the purchase, sale and distribution of building materials to retailers in the Savannah area. The plywood shipments imported from Korea belong to Dixie Plywood (Houston) until they are transferred by book entry to Dixie Plywood (Savannah) on arrival at destination. In the present case Dixie Plywood of Houston resold the plywood purchased from the foreign manufacturer to the Savannah corporation.[3] The profit to the Houston company on the resale to Dixie Plywood of Savannah of the plywood was $1,353 above landed cost, a figure based on a mark-up of $3.00 per sheet. Since Dixie of Houston disavows any control or ownership of the Savannah wholesaler, the resale price to the latter must be treated as an armslength transaction between the two.

The stevedore and the shipowner compute the damage to the ship of plywood as follows:

3. The General Manager of Dixie Plywood of Houston, J. E. Stevens, testified on deposition that the entire shipment was specifically ordered for sale to Dixie Plywood of Savannah. (Dep., p. 32). However, another witness for plaintiff, W. L. Hamilton, General Manager of Dixie Plywood of Savannah, testified that 6,000 of 14,100 sheets of plywood were destined for Dixie Plywood of Atlanta, Inc.

SHIPOWNER

Invoice cost of cargo	$19,401.60
Plus freight	3,825.22
Plus duty	3,880.40
Landed cost	$27,107.22
Less salvage	21,551.11
Loss	5,556.11
Plus profit or resale	1,356.60
	$ 6,912.71
Plus salvage expense	2,631.65
	$ 9,544.36
Less 25% of shipment representing sound cargo	$ 2,386.09
Actual loss	$ 7,158.27

STEVEDORE

Invoice cost	$19,401.60
Plus profit on resale	1,353.00

Plus freight	$ 3,825.22
Plus duty	3,880.40
Plus salvage expense	2,631.65
Total	$31,091.87
Less salvage	21,551.11
Loss	$ 9,540.76
Less value of 32 sound crates	3,153.23
Actual loss	$ 6,387.53

IV

Plaintiff claimed that there was damage to all of the 94 crates of plywood on outturn at Savannah. It consisted of chipped edges and ends with cutting, chaffing and indentation, split boards, boards missing or broken and top packaging broken and contents chaffed, cut or rubbed on the ends. The General Manager of Dixie Plywood of Savannah, W. L. Hamilton, who inspected the cargo crate by crate, testified that none of the plywood was in saleable condition. He said that it was his experience that every time there is damage to a crate one may "almost bet" that there is damage to the plywood itself. According to J. E. Stevens who did not see the damaged cargo, Mr. Hamilton informed him that he had inspected same and that he did not feel that Dixie of Savannah could sell or use it.

The entire shipment of 94 crates was treated as damaged and no part of the cargo was accepted. It was sold to a South Carolina salvage company on bids for $21,551.11.

Harry E. Jennings, a marine surveyor who inspected the crates following discharge at Savannah, testified that 32 were in sound condition. Captain Jennings so informed a surveyor representing the interest of the underwriters. He was told that the Houston company had refused to take delivery of any part of the shipment.[4] Its underwriter arranged the salvage sale.

One injured by the negligent acts of another must exercise reasonable care in order to avoid loss and to minimize the resulting damage. To the extent that the damages are due to failure to exercise such care, there can be no recovery. See *Compagnie De Navigation, etc. v. Mondial United Corporation*, 316 F.2d 163, 171 (5th Cir.); *Santiago v. Sea-Land Service, Inc.*, 366 F.Supp. 1317 (D.,P.R.); *Emmco Insurance Company v. Wallenius Carribean Line, S.A., supra*, 492 F2d 508, 514-515. The burden of proof as to failure by a shipper or cargo owner to mitigate the damage is cast on the shipowner. *Emmco Insurance Co., supra*, at 514. I will return

4. In several cases that have come before me in which cargo damage has been discovered upon delivery at the Georgia State Port in Savannah, consignees have refused acceptance of the delivery as a whole because there was damage to a considerable part. The entire shipment is sold as salvage. In the present case J. E. Stevens testified: 'If you have a large shipment and you've got a half dozen or so good crates out of the thing, it really isn't worth it just to pull those out and then -- it's best just to get – just let the whole thing go, because you're only going to get a few hundred pieces, and it's more costly to haul less than a truck load....from the dock. It's more costly and trouble to handle than just – really, you're probably just better off to let it go." Dep., p. 12-13.

to the subject of the damage to the plywood after surveying the law as to the appropriate measure of recovery applicable to this case.

V

In the event of loss or damage to the cargo, the carrier's liability is ordinarily measured by the difference between the market value at destination if the shipment had arrived in good condition and its market value as damaged. See *Holden v. S. S. Kendall Fish*, 395 F. 2d 910 (5th Cir.); *Waterman Corporation v. United States Smelting, Refining & Mining Co.*, 155 F. 2d 687, 694 (5th Cir.); *The Ansaldo San Giorgio I v. Rheinstrom Brothers Co.*, 294 U.S. 494; *Encyclopaedia, Inc. v. SS Hong Kong Producer*, 422 F. 2d 7, 19 (2nd Cir.); *Atlantic Mutual Insurance Company v. Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (7th Cir.), cert. den. 375 U.S. 819; *Daido Line v. Thomas P. Gonzalez Corporation*, 299 F.2d 669 (9th Cir.).

However, market value is only one method of ascertaining the loss to the shipper. It may be discarded for more accurate means if available. *Illinois Central Railroad Company v. Crail*, 281 U. S. 57, 64; *Reider v. Thompson*, 197 F.2d 158 (5th Cir.). The market value standard does not have to be applied where there is a better means of compuing actual damage. *F. J. McCarty Company v. Southern Pacific Co.*, 428 F.2d 690 (9th Cir.)., *Great Atlantic & Pacific Tea Company v. Atchison, Topeka and Santa Fe Railway Company*, 333 F. 2d 705 (7th Cir.). Under COGSA, a carrier's liability is limited to "the amount of damage actually sustained". 46 U.S.C. § 1304(5). Fair market value and actual damage are equatable in a proper case. The Act looks to the economic realities of the loss rather than the contrac-

tual bargain. *Holden v. S.S. Kendall Fish, supra,* 395 F.2d 910, 912-913.

"The primary object in awarding damages is to indemnify plaintiff for the loss sustained by reason of the carrier's fault, and with respect to this issue plaintiff bears the burden of proof." *Interstate Steel Corporation v. S.S. "CRYSTAL GEM",* 317 F.Supp. 112, 121 (S.D., N.Y.). "The assessment of damages in particular situations has called for the development of lesser rules, the use of common sense and the creation of exceptions, all to the end that the shipper whose property has been affected be made whole." *Santiago v. Sea-Land Service, Inc., supra,* 366 F.Supp. 1309, 1314 (D., P.R.).

The invoice cost of cargo may establish fair market value thereof in sound condition. *Emmco Insurance Company v. Wallenius Caribbean Line, S.A.,* 492 F.2d 508 (5th Cir.); *Elia Salzman Tobacco Co. v. SS Mormacwind,* 371 F.2d 537, 539-40 (2nd Cir.); *Weirton Steel Co. v. Isbrandtsen-Moller Co.,* 126 F.2d 593, 594 (2nd Cir.). Where a consignee has contracted to resell the cargo after delivery at a higher price, it has been held that the measure of recovery of damages against the vessel is the difference between the resale price and the fair market value of the shipment had it not been damaged in transit. *Samincorp v. S. S. Rivadeluna,* 276 F. Supp. 251, 257 (D., Del.).

VI

General Manager Stevens of Dixie of Houston testified on deposition that at the time of delivery of the cargo in 1973 the plywood market was rising rapidly. Apparently the period involved coincided with a short supply of pulpwood and the removal of price controls. The proceeds of

the salvage sale bears this out. The invoice cost, plus duty and freight amounted to $27,107.22. Despite presence of much damage, the plywood brought $21,551.11 or approximately 80% of the invoice-expense-profit value if delivered in good order. Mr. Stevens testified that the basis of value he used was "actual cost" [invoice price] plus a wholesale mark-up of 15% plus the customary retain mark-up of 25%. Dep., pp. 8-9.

However, plaintiff is apparently dissatisfied with that evaluation of its loss. Dixie of Houston would ignore invoice price. Kirby Beame, the General Manager of Guerry Lumber Company, a retailer, calculated market value on the existing retail price at Savannah – $4.98 per piece. That method would produce a value of the 94 crates of $70,218. There are 150 sheets per crate.

This Court finds that plaintiff is not entitled to recover on the basis of the retail price. Nor can value be increased by a whole-sale mark-up of 15% when it had resold the plywood on a 5% profit over invoice cost. Plaintiff was not forced to purchase plywood at retail in order to comply with its commitments.

Under COGSA the measure of recovery for breach of a contract of affreightment is, as stated, the actual damage sustained. I conclude that the appropriate measure of damage in this case is the invoice price, plus freight, duty and the profit on resale to the wholesaler less the salvage value of the goods. If this method produces a valuation that is low in the light of the then prevailing plywood market, such is the plaintiff's own doing. It pre-sold the shipment to Dixie of Savannah at a mark-up of only 5%. To compute the loss to Dixie of Houston on any other basis would be to disre-

gard the actual damage requirement of COGSA. It would make the plaintiff more than whole where the statute merely requires recompense.

VII

As stated, the measure of damage to the cargo that will be applied is the invoice price, plus cost of transportation, import duties, and profit on resale less proceeds of the salvage sale. There is an additional factor. The damages so computed should be reduced by the amount by which plaintiff could have reasonably mitigated its lose. I recur to that subject.

Defendants contend that 32 crates of plywood were in good order at destination. There was no adequate inspection by plaintiff of their contents on outturn. Evidence was not presented at the trial as to the actual condition of the entire shipment when it was sold at salvage. Nor was there testimony as to what each category of damaged (or undamaged) plywood brought on the highest bid.

Mr. Phil Hamilton of Dixie of Savannah surmised that since the edges of the crates showed signs of rough handling the plywood was damaged. A survey of the exterior of the crates by the shipowner's representative indicated no damage to the exterior of 32 crates. Captain Jennings surmised that damage to their contents was unlikely.

To mitigate damages requires a more adequate survey to determine the extent of the loss than was undertaken by the plaintiff. The amount brought by the cargo as salvage indicates that a substantial portion thereof was in good order when discharged. I realize that time, trouble and ex-

expense is involved in inspection and appraisal of damage to contents of crates. It is convenient to sell the entire cargo only as salvage than to dispose of the good order portion separately.

The gross salvage proceeds, exclusive of expenses, amounted to $21,551.11. The plywood in at least 36 crates was badly damaged. Obviously, most of the value as salvage is attributable to what was paid for the plywood in good order. A small portion only of the proceeds was necessarily derived from the recoopered crates. In fact, the sound and lesser damaged plywood could have brought a price materially above the invoice cost plus duty, freight and profit on resale. Clearly, the sound plywood lost nothing in actual value to plaintiff by its sale as salvage. Under such circumstances, defendants cannot contend that Dixie of Houston failed to mitigate its damages in not selling the sound part of the cargo by separate, private sale thereof.

I find that plaintiff's recovery is not reducible on the theory of failure to minimize its loss.

Expenses and commissions connected with the salvage totalled $2,631.65. In the case of cargo damage, expenses "prudently incurred in mitigating the loss will be allowed as part of the damage". *Carver's Carriage by Sea* (8th ed.), Sec. 713; also 22 Am Jur 2d, Damages § 169. *Cf. Schroeder Bros. Inc. et al. v. M/V Saturnia*, 1958 A.M.C. 1785, 1806 (S.D., N.Y.). The amount of expense is recoverable as part of the damages sustained by the plaintiff.

VIII

Applying the standard adopted by this Court in measuring damages actually sustained, the loss to plaintiff is com-

puted as follows:

invoice cost	$19,401.60	
freight	3,825.22	
duty	3,880.40	
profit on resale	1,356.60	
($3 per M.)	$28,463.82	
LESS gross salvage		21,551.11
proceeds	$21,551.11	
	$ 6,912.71	
PLUS salvage		
expense	$ 2,631.65	
Total Damages	$ 9,544.35	

Judgment will be entered against the vessel, her owner and charterer in the amount of $9,544.36 with interest on the portion thereof representing cargo damage at 7% per annum from the dateof discharge at Savannah, April 12,1973[5] The amount awarded for commission and expenses in connection with the salvage sale will bear interest at the time rate beginning with the time of payment thereof,July 3,1973.

No evidence was presented in support of a finding against the stevedore and judgment is rendered in its favor. It is understood, however, that South Atlantic Terminals, Inc., in accordance with the stipulation between it and the other defendants,will pay an agreed percentage of the judgment or will reimburse the other defendants to that extent.

Judgment will be entered accordingly.

This March 28th, 1975.

s/ Alexander A. Lawrence
CHIEF JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA

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5. As to award of interest, see *American Smelting & Refining Co. v. Black Diamond Steamship Corp.*, 188 F.Supp. 790 (S.D.,N.Y.); *Trans Amazonica Iquitos, S.A. v. Georgia Steamship Co.*, 335 F.Supp. 935 (S.D., Ga.); 80 C.J.S. Shipping §158.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75 - 2925
Summary Calendar*

DIXIE PLYWOOD COMPANY,
Plaintiff-Appellant

versus

SS FEDERAL LAKES, her engines, boilers,
Etc., ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Georgia
(December 9, 1975)

Before BROWN Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F 2d 966.

ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED: Jan 7, 1976
U. S. Court of Appeals
Edward W. Wadsworth
Clerk

NO. 75 - 2925

DIXIE PLYWOOD COMPANY,
Plaintiff-Appellant

versus

SS FEDERAL LAKES, her engines, boilers,
Etc., ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING
(January 7, 1976)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Supreme Court, U. S.
FILED
MAR 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1340

DIXIE PLYWOOD COMPANY, *Petitioner,*

v.

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A., FEDERAL COMMERCE & NAVIGATION CO., LTD., and SOUTH ATLANTIC TERMINALS, INC., *Respondents.*

BRIEF OF

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A.,

and

FEDERAL COMMERCE & NAVIGATION CO., LTD.,

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1340

DIXIE PLYWOOD COMPANY, *Petitioner,*

v.

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A., FEDERAL COMMERCE & NAVIGATION CO., LTD., and SOUTH ATLANTIC TERMINALS, INC., *Respondents.*

BRIEF OF

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A.,

and

FEDERAL COMMERCE & NAVIGATION CO., LTD.,

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The trial court's final order is found at 404 F. Supp. 461; the order of the United States Court of Appeals for the Fifth Circuit affirming the trial court is noted at 525 F.2d 691.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit, unassisted by a transcript of the evidence presented in the trial court, erred in affirming the trial court's evaluation of testimony which petitioner contends to have been contradictory, which evaluation resulted in the rejection of Dixie Plywood's theory of damages.

STATEMENT OF THE CASE

In its brief to the Court of Appeals, plaintiff-appellant Dixie Plywood Company, petitioner herein, conceded that the trial court's final order, now reported at 404 F. Supp. 461, is an accurate reflection of the facts of record. Respondents S.S. FEDERAL LAKES, Patras Navigacion, S.A., and Federal Commerce & Navigation Co. (hereinafter, "Federal Lakes" or "the vessel") fully concurred in that concession, and continue to do so.

REASONS FOR DENIAL OF THE WRIT

As this Court has explained in Rule 19, writs of certiorari to a Court of Appeals are granted only "only where there are special and important reasons therefore." In an effort to conform this case to the examples set forth in the rule, Dixie Plywood asserts that the decisions below "create a conflict with all other U.S. Appellate Courts." (Petition for certiorari, p. 4 (emphasis deleted.))

While no other decisions than the Fifth Circuit's ruling in *Holden* v. *S.S. Kendall Fish,* 395 F.2d 910 (5th Cir. 1968), are referred to in an argument of this point,[1] presumably this reference is an attempted com-

[1] In the Statement of the Case, Dixie argues that an example of inconsistency is found by comparison of the trial court's decision with that in *Pioneer Import Corp.* v. *The Lafcomo,* 159 F.2d 654 (2d Cir.), *cert. denied sub nom., Black Diamond Lines* v. *Pioneer Import Corp.,* 331 U.S. 831 (1947). This is Dixie's first citation of that decision in these proceedings.

pliance with the first criterion of Rule 19(1)(b). Dixie further contends that the trial court (and, by its affirmance, presumably the Court of Appeals as well) "erred in its interpretation in [*sic*] the case of *Illinois Central Railroad Company* v. *Crail,* 281 U.S. 57, 64." [Petition for certiorari, p. 5] Apparently this argument addresses itself to Rule 19(b)'s fourth criterion.

Federal Lakes submits that neither argument justifies this Court to grant Dixie's petition. First, Dixie failed to prove that market price in Savannah was an accurate measure of damages. Dixie contends that the trial court erred in rejecting what Dixie now styles as "express testimony as to the fair market value at the port of destination." However, this assertion skirts the issue. *Which* testimony as to fair market value is to be controlling? Dixie's own evidentiary presentation as to value is fully discussed in the trial court's order (404 F. Supp. at 463, 466), where it is observed that plaintiff presented two witnesses whose testimony dealt with value: J. E. Stevens, General Manager of Dixie Plywood of Houston,[2] and Kirby Beame, Vice President and General Manager of Guerry Lumber Company, a Savannah, Ga., building supply dealer. The explicit language of the trial court's order (404 F. Supp. 461) shows a careful weighing of the testimony of Messrs. Stevens and Beame in reaching the conclusion that under the facts of this case—a rapidly rising market coupled with a short supply of plywood and the recent removal of price controls—retail price was rendered an illusory index of fair market value. Reliance on the invoice price thus served to afford to Dixie the benefit of its contractual bargain rather than conferring a windfall.

[2] Stevens' deposition was included in the record on appeal.

Dismayed by the effect of its own evidence, Dixie now seeks to read *Holden* v. *S.S. Kendall Fish,* 395 F.2d 910 (5th Cir. 1968), as a panacea for its earlier failure to present clear and convincing evidence of its monetary losses. Simple comparison of the *Holden* opinion with that of the trial court in these proceedings leads logically to a conclusion that the two opinions are but variations on the same theme. In *Holden,* the Fifth Circuit rejected the shipper's assertion that invoice value, rather than fair market value, should be used as the measure of damages; the reasoning for this holding is equally applicable to the facts at bar: "The carrier is not and should not be the guarantor of the ups and downs of commodity prices." 395 F.2d at 913.

Holden involved unusual facts: the market price at the port of destination was less than the C.I.F. valuation in the bill of lading. *See* 395 F.2d at 912, n.2. The Fifth Circuit further clarified the unique posture of that case by agreeing with J. Heebe [3] that "the amount of damage actually sustained," as set forth in COGSA § 4(5), [4] is to be computed through a formula which does not penalize the carrier for the viccisitudes of the economy: "Courts have consistently held that COGSA seeks the economic realities of the loss rather than the contractual bargain." *Id.* at 912. But where the contractual bargain is a more accurate reflection of "fairness," the *sine qua non* of "fair market value," the contract should bear great weight.

Since the entirety of the testimony of Mr. Beame had not been preserved in the record, the Fifth Circuit could

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[3] *Holden* v. *S.S. Kendall Fish,* 262 F. Supp. 862 (E.D. La. 1966).

[4] "In no event shall the carrier be liable for more than the damages actually sustained." 46 U.S.C. § 1304(5), penultimate paragraph.

only consider the resume of that testimony which is contained in the trial court's order itself. *Drake* v. *General Financial Corp.,* 119 F.2d 588 (5th Cir. 1941). The full extent of that testimony, as recounted in the order, was the retail and wholesale price of plywood "in the Savannah area." 404 F. Supp. at 463. Dixie's own General Manager presented evidence which fully supported the conclusion that retail price was not, under conditions then prevailing, a reliable measure of damages (404 F. Supp. at 466), further admitting that he was not "specifically familiar with" the market value in Savannah at the time of delivery.

Under these circumstances, the trial court, as trier of fact, concluded that neither retail price nor wholesale plus 15% should be the measure of damages, recognizing that "Plaintiff was not forced to purchase plywood at retail in order to comply with its commitments." (404 F. Supp. at 466.)

Hence, Dixie attacked the factual determinations of the trial court by arguing that the testimony of one of Dixie's witnesses should be given preference over another of it witnesses. The appellate courts have frequently and firmly expressed their disinclination to search the record in a non-jury admiralty case where the trial court's findings are set forth in clear and specific detail (*see, inter alia, Skidmore* v. *Grueninger,* 506 F.2d 716, 723-4, (5th Cir. 1975); *and see, McAllister* v. *United States,* 348 U.S. 19 (1954), and *Caradelis* v. *Refineria Panama, S.A.,* 384 F.2d 589 (5th Cir. 1967)), and again demonstrated that disinclination by the affirmance herein.

The focal point of Dixie's appeal was the absence of "proof" in the trial court's order "that market value will not establish a just measure of damages." This

attempted invasion of the province of the court, compounded by the absence of a record adequate to reflect the totality of the evidence presented, failed to present a justiciable issue. In short, Dixie criticized the content of the record but failed to present that record in full. It was not the burden of the trial court to prove damages; that burden rests upon the plaintiff. *Weirton Steel Co.* v. *Isbrandtsen-Moller Co.*, 126 F.2d 593 (2d Cir. 1942); *Interstate Steel Corp.* v. *S.S. "Crystal Gem,"* 317 F. Supp. 112, 121 (S.D.N.Y. 1970). Having failed to satisfy this burden at trial, Dixie asked the Court of Appeals to grant an additur. This argument was without merit.

Alternatively, Dixie argues that the trial court erroneously assigned the burden of proof, contending that the carrier must show that market value is not a proper measure of damages. The case upon which Dixie relies, *Reider* v. *Thompson,* 197 F.2d 158, (5th Cir. 1952), simply states that the trier of fact is entitled to consider a plaintiff's own evidence against him in determining damages; "the measure of damages is a rule of law and the ascertainment of damages is a matter of evidence." 197 F.2d at 161; and *See McCarty Co.* v. *Southern Pacific Co.,* 428 F.2d 690 (9th Cir. 1970). To assert that the defendants did not "prove" the impropriety of blind adherence upon "market value" avoids the reality that the trial court *found* market value to be an inaccurate barometer of loss. No showing of error as to this finding has been made; it is therefore immaterial whether the defendants' proof or Dixie's failure of proof formed the basis for the decision.

CONCLUSION

Petitioner has failed to show any reason justifying review by writ of certiorari. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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